

Chapter 5: SENTENCING OUTSIDE OF THE BOX

There are three ways to sentence outside of the otherwise applicable box:

- (1) Rule 11(e)(1)(C);
- (2) A departure principle; or
- (3) A decision by a judge not to use the sentencing guidelines.

5.1 Superior Court Rule of Criminal Procedure 11(e)(1)(C)

A Rule 11(e)(1)(C) plea agreement that is accepted by the court controls the applicable sentence. This means that if the parties and the court agree to a particular sentence or sentencing range, it need not fall “within the box.”

5.2 Departures

5.2.1 *Departure Principles*

One of the bedrock principles underlying the development of the guidelines was that like offenses/offenders should be sentenced alike and different offenses/offenders should be sentenced differently. The grid was designed with typical conduct for the offenses in mind and the ranges are quite broad, preserving the judge’s discretion to take into account factors other than the offense of conviction and the criminal history of the offender in a guideline compliant sentence. The Commission, therefore, anticipates that most offenders will be sentenced “within the box.” However, there are *extraordinary* cases where such a sentence would not serve the ends of justice. Consequently, the Commission developed a non-exclusive list of aggravating and mitigating factors to permit sentencing outside of the grid options or ranges. If the judge finds one of the enumerated factors to be substantial and compelling, the judge is not bound by the grid options and ranges. Similarly, the judge may use the “catchall” departure (Aggravating Factor #11; Mitigating Factor #10) if the judge finds another substantial and compelling reason, comparable in gravity to the enumerated factors, that aggravates/mitigates substantially the seriousness of the offense or the defendant’s culpability. Under such circumstances, the judge is not bound by the grid options and ranges. *Any legal sentence may be imposed.*

The judge must state on the record the aggravating or mitigating factor upon which he or she relies in sentencing outside of the box. If the judge applies the catchall Aggravating Factor #11 or Mitigating Factor #10, then the judge must state on the record what substantial and compelling basis he or she found that was comparable in gravity to the enumerated aggravating and mitigating factors. In those cases where the judge has found both aggravating and mitigating factors, the balance should weigh more heavily on one side or the other before a departure is granted.

5.2.2 *Aggravating Factors*

- (1) There was deliberate cruelty to a victim or there was gratuitous violence inflicted upon a victim in a manner substantially beyond that normally associated with this offense.
- (2) A victim was particularly vulnerable due to age or reduced physical or mental capacity, which was known or should have been known to the defendant, unless that vulnerability constituted an element of the offense of conviction.
- (3) A victim sustained a “devastating injury.” Devastating injury is defined as a physical or mental injury that results in one or more of the following:

- (a) Permanent and substantial impairment of the person's employment opportunity and/or lifestyle;
- (b) Permanent, gross disfigurement; or
- (c) Medical confinement and/or immobilization for a period of more than three months.
- (4) The crime committed or attempted was substantially premeditated, as evidenced by a high degree of planning or sophistication or planning over an extended period of time.
- (5) The defendant committed for hire or hired another to commit any one of the following offenses: murder; manslaughter; first degree sexual abuse; kidnapping; mayhem/malicious disfigurement; aggravated assault; assault with intent to commit any of the foregoing; assault with intent to kill; assault with a deadly weapon; or arson.
- (6) The offense was part of an enterprise significantly related to organized crime or high-level drug trafficking. This aggravating factor does not apply in cases charging only distribution or possession with intent to distribute a controlled substance where the defendant's only connection to organized crime or high-level drug trafficking is street level drug trafficking.
- (7) The defendant threatened, bribed, attempted to bribe, induced, or attempted to induce a victim, a member of the victim's family, or a potential witness, or any other person to withhold truthful testimony or provide false testimony, or otherwise attempted to obstruct justice, unless the defendant is separately convicted of an offense that arises out of the same conduct.
- (8) The offense is a violation of Chapter 32 of Title 22 of the D.C. Official Code, which involves an intended or actual monetary loss substantially greater than what would normally be associated with the offense or any one or more of the following:
 - (a) The offense(s) involved multiple victims or multiple incidents per victim;
 - (b) The defendant has been involved in other conduct similar to the current offense(s) as evidenced by the findings of criminal, civil or administrative law proceedings or the imposition of professional sanctions; and/or
 - (c) The defendant used his or her position of confidence or fiduciary responsibility to facilitate the commission of the offense(s).
- (9) The offender, in attempting to gain or while holding public office by appointment or election, betrayed the public trust by his or her unlawful conduct.
- (10) The consecutive/concurrent sentencing policy results in a guideline sentence so lenient in relation to the seriousness of the offense and the history of the defendant that imposition of the guideline sentence would result in manifest injustice. A departure based solely on this factor shall not result in a sentence that exceeds the sentence that would result if all guideline sentences were consecutive.
- (11) There is any other substantial and compelling basis, as articulated by the sentencing judge, comparable in gravity to those listed in 1-10 above, which aggravates substantially the seriousness of the offense or the defendant's culpability.

Note: Going to trial is not an aggravating factor and should not be used to go outside of the box.

5.2.3 Mitigating Factors

- (1) A victim was an aggressor, initiator, willing participant in, or provoker of the incident to such a degree that the defendant's culpability is substantially less than that typically associated with the offense.
- (2) Before detection in a crime other than a crime of violence, the defendant compensated or made a good faith effort to compensate victim(s) for any damage or injury sustained.
- (3) The defendant participated under duress, coercion, threat or compulsion insufficient to constitute a complete defense, but which significantly reduces the defendant's culpability.
- (4) The offense was principally accomplished by another, and the defendant manifested extreme caution or sincere concern for the safety and well-being of a victim.

- (5) The defendant, with no apparent predisposition to do so, was induced by others to participate in the crime.
- (6) The defendant's capacity to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of law was impaired significantly, though not sufficiently to constitute a complete defense. Voluntary use of alcohol or other drugs should not be considered in relation to this mitigating factor.
- (7) The defendant has provided substantial assistance to law enforcement in the detection or prosecution of other offenders, and departure for this reason does not demean the seriousness of the defendant's crime or create an unacceptable risk to the safety of the community.
- (8) The guideline sentence calls for incarceration but, after consultation with corrections authorities, the court determines that the defendant, by reason of obvious and substantial mental or physical impairment or infirmity, cannot be adequately protected or treated in any available prison facility.
- (9) The consecutive/concurrent sentencing policy results in a guideline sentence that is so excessive in relation to the seriousness of the offense and history of the defendant that imposition of the guideline sentence would result in manifest injustice. A departure based solely on this factor shall not result in a sentence that is less than the sentence that would result if all guideline sentences are concurrent.
- (10) There is any other substantial and compelling basis, as articulated by the sentencing judge, comparable in gravity to those listed in 1 to 9 above, which does not amount to a defense but which substantially mitigates the seriousness of the offense or the defendant's culpability.

Note: The entry of a guilty plea is not a mitigating factor and should not be used to go outside of the box but it may be used to determine what sentence to impose within the box.

5.2.4 *No Limits on the Kind and Duration of a Sentence if there is a Substantial and Compelling Reason to Depart*

If the judge has a sufficient reason to sentence outside of the box, there are no constraints (other than statutory limits) on the exercise of the judge's discretion. Any legal sentence may be imposed. Judges should consider the purposes of these guidelines and should incorporate into their sentences, to the extent possible, the principle of proportionality, reserving the maximum sentence for the worst offenses and offenders and the minimum sentence for the least serious offenses and least culpable offenders, and departing from the grid options and ranges only to the extent necessary to account for the aggravating or mitigating factor that necessitated the departure.

There are two exceptions to the principle that a sentence of any legal length may be imposed if the judge finds a substantial and compelling reason to depart from the otherwise applicable box: Aggravating Factor #10 and Mitigating Factor #9. If the judge decides that the application of the concurrent rules in a case would result in a sentence that is too lenient, the judge may depart on the basis of Aggravating Factor #10. The sentence resulting from a departure based solely on Aggravating Factor #10 cannot be higher than the sentence the judge could impose if s/he ran all of the sentences consecutively. Similarly, if the judge decides that the application of the consecutive rules in a case would result in a sentence that is too harsh, the judge may depart on the basis of Mitigating Factor #9. The sentence resulting from a departure based solely on Mitigating Factor #9 cannot be lower than the sentence the judge could impose if s/he ran all of the sentences concurrently.

5.2.5 *Departure Procedures*

While judges are free to develop their own sentencing procedures, the guidelines system will require a level of coordination between the parties, the court and CSOSA heretofore not regularly practiced. To ease the transition, the Commission recommends procedures and practices to give all parties

sufficient notice to prepare for the sentencing hearing. These practices are not designed to encourage mini-trials, but rather to avoid blind-siding one party or the other at the time of sentencing and to avoid the necessity for a continuance for matters that could have been disposed of easily with some notice.

The Commission encourages judges and the parties to follow these procedures (or those adopted by the judge to the extent they differ). However, failure to follow such procedures should not bar either party from arguing a departure. Constitutional demands of due process and effective assistance of counsel require that the parties be allowed to argue all potentially applicable factors at the sentencing hearing. On balance, continuing the sentence hearing is a better use of resources than litigating post-conviction claims on the issue.

Sentencing hearings should be scheduled so that the pre-sentence report is completed and provided to both parties at least two weeks prior to the hearing to give the parties the opportunity to determine whether they will seek a departure.

If a party intends to rely on a departure principle at sentencing, that party should provide notice in writing to the other party and the court at least one week prior to sentencing. The notice should include a statement of reasons why the sentencing range is inappropriate, the evidence or information to be relied upon, and the substantial and compelling reason that necessitates or justifies the departure.

If a party knows that it will seek a departure and that it will submit evidence or information, not introduced at trial or a pretrial hearing, that the other party might want to contest, the moving party should notify the other party and the court as early as possible so that sentencing will not have to be continued. The Commission anticipates that sentencing will proceed in the future much like it has in the past and that it would be the rare case where witnesses would be sworn or evidence taken in open court during the sentencing hearing.

If the judge, *sua sponte*, intends to consider a departure principle not raised by the parties, the judge should provide notice in writing to the parties at least one week prior to sentencing. The notice should set forth the basis on which the judge will consider such a sentence.

The sentencing data form provides a place to enter the aggravating or mitigating factor(s) the judge relied upon in sentencing outside of the box. If the judge uses one of the “catchall” provisions, he or she must state the basis upon which he or she relied and why it is a substantial and compelling reason of comparable gravity with the enumerated factors.

Note: A judge’s failure to follow the procedures set forth above or to follow his or her own procedures is not a basis for appeal.

5.3 Not Using the Guidelines

The guidelines are voluntary. The Commission will compile statistical data regarding judges who do not follow the guidelines, but does not intend to identify judges by name. There are no sanctions for failing to follow the guidelines and any lawful sentence is not appealable whether or not it complies with the guidelines. As a consequence, a judge retains total discretion to impose any lawful sentence. Because of the principles and procedures used in developing the guidelines, the Commission hopes and expects that judges will find a sentence that fits both the offense and the offender in the *grid* options and ranges or will apply a departure principle when there are substantial and compelling reasons to do so.

The sentencing data form will provide a place for the judge to indicate that he or she is not using the guidelines and to explain his or her reasoning for this decision. It is critically important for judges to inform the Commission why he or she believes the guidelines are not suitable for a particular combination of an offense and offender.

Note: The judge's decision to use or not use the guidelines or to impose or not impose a guideline-compliant sentence is not appealable by either party.